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No. 07-633

IN THE
SUPREME COURT OF THE UNITED STATES

VENETIAN CASINO RESORT, LLC,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

RICHARD S. ROSENBERG
JOHN J. MANIER
(Counsel of Record)
BALLARD, ROSENBERG,
GOLPER & SAVITT LLP
10 UNIVERSAL CITY PLAZA, 16TH FLOOR
UNIVERSAL CITY, CALIFORNIA 91608-1097
(818) 508-3700

FREDERICK H. KRAUS
VENETIAN CASINO RESORT, LLC
3355 LAS VEGAS BOULEVARD SOUTH
LAS VEGAS, NEVADA 89109
(702) 414-4409

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

ARGUMENT 1

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Page

Allied Tube & Conduit Corp. v. Indian Head, Inc.
486 U.S. 492 (1988) 2, 5, 6, 9, 10

BE&K Construction Co. v. NLRB
536 U.S. 516 (2002) 1, 2, 3, 4, 6, 8, 10, 12

Eastern R. Presidents Conf. v. Noerr Motor Freight
365 U.S. 127 (1961) 1, 2, 3, 5, 6, 10, 11, 12

NLRB v. Calkins
187 F.3d 1080 (9th Cir. 1999) 7

Lechmere, Inc. v. NLRB
502 U.S. 527 (1992) 2, 6, 8, 10

Macmillan Pub. Co. v. NLRB
194 F.3d 165 (D.C. Cir. 1999) 6

NLRB v. Burnup & Sims
379 U.S. 21 (1964) 8

Republic Aviation Corp. v. NLRB
324 U.S. 793 (1945) 9

SEC v. Banner Fund Int'l
211 F.3d 602 (D.C. Cir. 2000) 6

SEC v. Chenery Corp.
318 U.S. 80 (1943) 6

Sosa v. DIRECTV, Inc.
437 F.3d 923 (9th Cir. 2006) 3, 4, 5, 6

Venetian Casino Resort v. Local Joint Executive Board
257 F.3d 937 (9th Cir. 2001),
cert. denied, 535 U.S. 905 (2002) 7, 8

STATUTES

National Labor Relations Act
§ 7, 29 U.S.C. § 157 7
§ 8(a)(1), 29 U.S.C. § 158(a)(1) 2

Nevada Revised Statutes
§ 614.160(1) 7

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ARGUMENT

In its petition, Venetian Casino Resort, LLC (the "Venetian") established that this Court's review is necessary to resolve the conflict between the Court of Appeals and the Ninth Circuit on the issue of whether this Court's *Noerr-Pennington* doctrine, as applied in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), establishes a generic rule of construction under which courts must construe federal statutes so as to avoid burdening conduct that implicates the protections of the First Amendment's Petition Clause unless the statute clearly provides otherwise. Contrary to the arguments in the Opposition ("Opp.") of Respondent National Labor Relations Board ("NLRB" or "Board"),

the Court of Appeals' decision limits the scope of "incidental" activities protected under *Noerr-Pennington* in the context of Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), to conduct that is a necessary prerequisite to petitioning. The Court of Appeals' decision thus conflicts with the Ninth Circuit's interpretation of *BE&K* and *Noerr-Pennington*, and this Court should grant review to resolve that conflict.

Respondent also fails to refute our showing that review is necessary to resolve the conflict between the Court of Appeals' decision and this Court's holdings in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). The Court of Appeals found that actions such as the Venetian's in this case – broadcasting a message warning non-employee union demonstrators that they were trespassing on its privately-owned sidewalk, and attempting a "citizen's arrest" of one demonstrator – are ordinarily subject to NLRB scrutiny. But as discussed in our petition, *Lechmere* shows that an employer generally has the right to attempt to exclude nonemployee union demonstrators from its private property. Thus, actions such as the Venetian's ordinarily are immune from Board scrutiny under *Lechmere*, and are properly deemed to be "incidental" to direct petitioning activity under *Allied Tube*. Respondent fails to reconcile the Court of Appeals' contrary conclusion with *Lechmere* or *Allied Tube* – or with *BE&K*, under which an unfair labor practice finding cannot be predicated on an employer's reasonable but unsuccessful lawsuit to vindicate its right to exclude nonemployees from its private property.

The petition also demonstrated that the Court of Appeals' decision conflicts with *Noerr-Pennington* and *BE&K* by enforcing the Board's order that the Venetian violated the NLRA by directly petitioning the police to make a report on its attempted "citizen's arrest." Respondent erroneously argues that we waived this argument, and scarcely attempts to dispute the direct conflict in authority on this point. Respondent thus fails to detract from our showing that this Court's review is necessary to resolve all of these important questions regarding the interplay between the NLRA and the Constitutional right to petition.

1. Respondent strains to argue that the Court of Appeals' decision does not conflict with *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006), "on the question of whether *Noerr-Pennington* immunity under the NLRA extends to conduct that is 'incidental' to direct petitioning." Opp. 13. But Respondent ignores the Ninth Circuit's holding that *Noerr-Pennington* constitutes "a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause." *Sosa*, 437 F.3d at 931 (citation omitted). Contrary to Respondent's characterization, *Sosa*'s broad holding was not dependent on whether the statute at issue is RICO, as in *Sosa*, or the NLRA, as here. Indeed, the Ninth Circuit explicitly derived this "generic rule of statutory construction" from this Court's application of *Noerr-Pennington* to the NLRA in *BE&K*. *Sosa*, 437 F.3d at 931.

It is likewise unavailing for Respondent to rely on the Court of Appeals' interpretation of *Sosa* as being "'limited to a narrow category of "incidental" activity: "[p]relitigation communication[] demanding settlement," that the [Ninth Circuit] found had a "sufficient-

ly close" connection' to litigation." Opp. 13 (quoting Pet. App. 22a). Although the prelitigation communication in *Sosa* was a settlement demand, *Sosa*, 437 F.3d at 936, the Ninth Circuit inferred a "generic" rule from *BE&K*, not one "limited" to settlement demands or RICO lawsuits.

Contrary to Respondent's assertion, the Court of Appeals quite clearly suggested the Venetian was required to show that its pre-litigation actions were "necessary prerequisite[s]" to injunctive relief in order to establish the conduct was "incidental" to its lawsuit. App. 21a. Respondent surmises the Court of Appeals addressed this issue only "because *petitioner* argued" that its conduct was a necessary prerequisite to its lawsuit "and that petitioner therefore qualified for immunity." Opp. 14 & n.3 (italics in original) (citing Pet. App. 20a). But the Venetian's showing was broader: It "*reasonably believed* it had to issue trespass warnings to the nonemployee demonstrators and seek assistance from law enforcement as a necessary prerequisite to establishing the elements for injunctive relief – particularly the requirement that it had no adequate remedy at law – and to avoid being found to have waived the very property rights its lawsuit was filed to protect." Pet. C.A. Br. 25 (italics added), *cited at* Opp. 14 and Pet. App. 20a; *accord* C.A. App. to Br. 253, 262-63, 292-93; Pet. App. 54a-55a.[1]

The Venetian's showing was entirely consistent with this Court's holding that a railroad industry publicity campaign constituted "incidental" conduct

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[1] At page 9 of its Petition for Panel Rehearing and Rehearing *En Banc*, the Venetian explicitly called the Court of Appeals' attention to its misquotation of the Venetian's opening brief.

protected by the Petition Clause and outside the scope of antitrust liability because it reflected "*a genuine effort* to influence legislation and law enforcement practices." *Eastern R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127, 144 (1961) (italics added). But the Court of Appeals did not address the Venetian's argument "on its own terms," Opp. 15, nor did it apply the generic rule of *Noerr Pennington*. Instead, it concluded that the Venetian's conduct was not protected because it was not actually necessary to the Venetian's lawsuit. Pet. App. 21a.

Respondent claims that the Venetian "argu[es] for the first time in this Court that its actions constituted prelitigation activities under *Sosa* because they are 'common features of litigation,' or 'authorized means of responding to unlawful trespass,' under Nevada law." Opp. 14 n.3 (citing Pet. 10-11). This representation is misleading and immaterial. The passage of the petition quoted by Respondent directly responded to *the Court of Appeals' conclusions*, in attempting to distinguish *Sosa*, that "broadcasting the trespass warning message and making the 'citizen's arrest' ... are neither common features of litigation nor statutorily protected litigation privileges," and that these activities therefore were not "sufficiently close" to the Venetian's lawsuit to merit First Amendment protection. Pet. App. 23a, *quoted at* Pet. 10. The Board made no such findings or conclusions in its decision. Pet. App. 25a-27a, 49a-57a.[2] As such, the Venetian's arguments were not "objections" that it was jurisdictionally required to

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[2] In fact, *Sosa* had yet to be decided at the time of the Board's 2005 decision. *See* Pet. App. 25a. The Board's decision also did not cite to *Allied Tube*, 486 U.S. 492, on which the Court of Appeals further relied on this point. *Compare* Pet. App. 20a-23a *with* Pet. App. 25a-62a.

raise before the Board. 29 U.S.C. § 160(e).[3] In any event, the Venetian has maintained repeatedly that its broadcast of the trespass warning and making of the "citizen's arrest" were protected as "incidental" to direct petitioning, *see* Pet. C.A. Br. 23-26, and the Venetian objected to the Board's contrary findings. C.A. App. to Br. 371-77.

Respondent dismisses the Venetian's disagreement with the Court of Appeals' conclusion as "fact-bound" and unworthy of review. Opp. 13-14. But Respondent fails to address our showing that the Court of Appeals' attempt to distinguish the instant matter from *Sosa* is illusory, and that the Court of Appeals manifestly failed to the generic rule of statutory construction that the Ninth Circuit inferred from *BE&K* and *Noerr Pennington*. The Court of Appeals' decision thus conflicts with the Ninth Circuit's interpretation of *BE&K* in *Sosa* and unduly limits *Noerr Pennington* in the context of labor law. Review should be granted to resolve this conflict.

2. Respondent unsuccessfully attempts to reconcile the Court of Appeals' decision with this Court's holdings in *Lechmere* and *Allied Tube*. Opp. 15-16. Contrary to Respondent's assertion, this Court in *Lechmere*, 502 U.S. at 535, clearly held that an employer generally is entitled to exclude nonemployee union demonstrators from its private property. Respondent quotes the Court of Appeals' statement that "*Lechmere* allows an employer the right to deny

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[3] The Court of Appeals thus contradicted the principle that it "cannot sustain agency action on grounds other than those adopted by the agency in the administrative proceedings." *Macmillan Pub. Co. v. NLRB*, 194 F.3d 165, 168 (D.C. Cir. 1999) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)).

access to its premises only where it has a property right to do so." Opp. 15 (quoting Pet. App. 13a). But it is Respondent and the Court of Appeals who miss the fundamental and obvious point: *An employer generally has the "property right" to exclude nonemployee union demonstrators from its private property.*

This point is bolstered, not refuted, by Respondent's citation to *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999), which was decided "in the *fairly unique context* of California's limitation of [employers'] property rights in favor of rights of expression." *Id.* at 1083 (italics added, citation omitted). The Ninth Circuit explicitly contrasted California's unique law with "Nevada state law," which applies to the instant matter and categorically "restricts [trespassory] picketing during the pendency of a labor dispute." *Id.* at 1093-94 n.8 (citation omitted).

Respondent misplaces its reliance on the Ninth Circuit's *after-the-fact* determination that the Venetian lacked the right to exclude nonemployees demonstrators from its privately-owned sidewalk. Opp. 15 (citing *Venetian Casino Resort v. Local Joint Executive Bd.*, 257 F.3d 937, 941, 948 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002)). The Ninth Circuit never questioned the Venetian's presumptive right under Nevada law to prohibit picketing on its private property "without the written permission of the owner or pursuant to an order from a federal court or agency of competent jurisdiction." NEV. REV. STAT. § 614.160(1)(a). Instead, the court framed the question presented as "whether a sidewalk *constructed on private property* to replace a public sidewalk, accommodating pedestrian traffic adjacent to Las Vegas Boulevard, *is a public forum* subject to the protections of the First Amendment."

Venetian Casino Resort, 257 F.3d at 939 (italics added).

Respondent's analysis thus confirms that the unfair labor practice finding in this case rests entirely on the Venetian's *defeat* in its lawsuit to vindicate its right to exclude nonemployee demonstrators from its privately-owned sidewalk. Opp. 15. But this result contradicts this Court's holding in *BE&K* that an employer cannot violate the NLRA by pursuing a reasonably-based but unsuccessful lawsuit. *BE&K*, 536 U.S. at 536-37.

Respondent also is wrong to dispute that *Lechmere* stands for the proposition that an employer's good-faith attempts to protect its private property ordinarily are immune from Board scrutiny. Opp. 15-16. The employer in *Lechmere* took several good-faith measures to protect its private property. It confronted nonemployee organizers in the employer's parking lot, informed them that it prohibited solicitation or handbill distribution on its property, and asked them to leave. 502 U.S. at 529-30. Respondent found that these actions violated the NLRA, but this Court disagreed and denied enforcement of Respondent's order. *Id.* at 541. This Court reaffirmed the "general rule that 'an employer may validly post his property against nonemployee distribution of union literature.'" *Id.* at 538 (citation omitted).

It is inappropriate for Respondent to invoke the proposition that an employer may violate the NLRA "when it interferes with activity protected by Section 7 in the good-faith but mistaken belief that employees were engaged in *misconduct*." Opp. 16 (italics added). In both cases Respondent cites for this principle, the employer discharged employees for activity protected by the Act. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23

(1964) (unlawful to discharge employees "for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred"); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797 (1945) (unlawful to discharge employee for wearing union insignia in violation of no-solicitation rule). The Court of Appeals did not cite these cases, both of which are inapposite because neither addressed an employer's good-faith exercise of its constitutional right to petition or exclusion of nonemployees from the employer's private property.

Respondent further fails to show that the Court of Appeals' decision "is fully consistent with *Allied Tube*." Opp. 16. Contrary to Respondent's suggestion, *ibid.*, the statement in *Allied Tube* that "[t]he ultimate aim is not dispositive" did not pertain to the relevance *vel non* of *improper* motive, but instead supported the opposite proposition – the defendant could not avoid antitrust liability "simply because the ultimate aim of the effort to influence the private standard-setting process was (principally) legislative action." 486 U.S. at 504. As Respondent concedes, Opp. 16, this Court in *Allied Tube* recognized the relevance of the defendant's improper motive "to lessen competition" and "reap substantial economic benefits from making it difficult for respondent to compete" in holding that the defendant's actions were not protected under the Petition Clause. 486 U.S. at 509.

Conversely, Respondent tacitly concedes that the Venetian acted for the good faith, nonretaliatory motive of protecting its private property rights. *See* Pet. App. 7a, 56a-58a. Nothing in *Allied Tube* supports the Court of Appeals' conclusion that the "context and nature of [the Venetian's] activity" falls outside the

scope of "incidental" activity protected under the Petition Clause. Instead, *Lechmere* shows that conduct such as the Venetian's ordinarily is immune from scrutiny under labor law. This Court should grant review to resolve the conflict between the Court of Appeals' decision and this Court's holdings in *Lechmere* and *Allied Tube*.

3. Respondent contends that the Court of Appeals' decision does not conflict with *Noerr* or *BE&K* because it did not explicitly address the Venetian's showing that its police report on the attempted citizen's arrest was protected as a direct and "genuine effort[]" to "'influence ... law enforcement practices." Opp. 16-17; *see* Pet. App. 24a, 53a. But as Respondent concedes, the Court of Appeals nevertheless affirmed Respondent's unfair labor practice finding as to the attempted citizen's arrest – which included the police report on the arrest. Opp. 16; Pet. App. 2a, 24a, 26a, 59a, 66a, 68a. It will not do for Respondent to characterize of the Court of Appeals' decision as merely "fail[ing] to vacate the Board's finding" on the citizen's arrest. Opp. 16. Respondent's orders are not self-executing; it must petition the Court of Appeals for enforcement. 29 U.S.C. § 160(e). Respondent makes *no attempt* to reconcile *Noerr* or *BE&K* with the Court of Appeals' enforcement of its order finding that the police report on the citizen's arrest violated the NLRA.

Respondent argues for the first time in this Court that the Venetian waived this issue because it "only summarily raised the issue in its briefs below." Opp. 17-18. Not so. Unlike the parties in the cases cited by Respondent, Opp. 17, the Venetian's brief set forth its "contentions and the reasons for them, with citations to the authorities and parts of the record on which [it relied]." *SEC v. Banner Fund Int'l*, 211 F.3d 602, 613

(D.C. Cir. 2000) (quoting FED. R. APP. P. 28(a)(9)(A)). The statement of facts in our Court of Appeals brief described the Venetian's unsuccessful attempt to have the police ("LVMPD") process the citizens' arrests and the Board's finding that this violated the NLRA. Pet. C.A. Br. 11, 15 (citing C.A. App. to Br. 9, 47-48, 161-62, 180-81, 293, 383-84, 391). After extensively analyzing relevant cases, *id.* at 17-23, our brief addressed the Board's finding on this issue:

> However, Venetian submits that all of the above-referenced pre-litigation activities were protected by the First Amendment as direct petitioning of governmental entities and/or as inextricably intertwined with such petitioning.
>
> LVMPD and the District Attorney are, of course, governmental law enforcement agencies and departments. The First Amendment gave Venetian *the express right* to contact the District Attorney and police department and ask that the police issue citations to demonstrators, eject demonstrators from the premises and make a report on an attempted citizen's arrest. These were *direct* and "genuine efforts" by Venetian to "influence ... law enforcement practices." ...

Id. at 23-24 (italics in original) (quoting *Noerr*, 365 U.S. at 144). Respondent does not, and cannot, identify what additional presentation was required to avoid waiver.

Nor did Respondent argue waiver in the Court of Appeals; it ignored the direct petitioning issue and argued that the Venetian's actions were not "incidental" because the Venetian ostensibly would not have been entirely "foreclosed" from pursuing its

lawsuit absent the activities. Resp. C.A. Br. 28-30. The Union *expressly acknowledged* that the Venetian's communications to demonstrators were "linked with a 'petition' for an arrest," Int. C.A. Br. 8, and conceded that the police report on the citizen's arrest did not violate the NLRA. *Id.* at 2, 7; *see* Pet. C.A. Reply Br. 3-7 & n.4. The Court of Appeals acknowledged our contention on this issue during oral argument, C.A. Tr. of Oral Arg. 13-15, 33-34, and never suggested that we waived the issue. Respondent offers no basis for a contrary conclusion. Nor does Respondent provide any additional support for disputing that the Court of Appeals' decision conflicts with *Noerr* and *BE&K* to the extent it enforces the Board's order finding the citizen's arrest and police report thereon violated the NLRA. This is another conflict in authority that warrants this Court's review.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD S. ROSENBERG
JOHN J. MANIER
(Counsel of Record)
BALLARD, ROSENBERG,
GOLPER & SAVITT LLP
10 UNIVERSAL CITY PLAZA
16TH FLOOR
UNIVERSAL CITY, CA 91608-1097
(818) 508-3700

FREDERICK H. KRAUS
VENETIAN CASINO RESORT, LLC
3355 LAS VEGAS BOULEVARD SOUTH
LAS VEGAS, NV 89109
(702) 414-4409

Counsel for Petitioner

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